No. 85-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SOLORIO
Yeoman First Class, U.S. Coast Guard,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Military Appeals

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BRIEF OF THE APPELLATE DEFENSE DIVISION UNITED STATES NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the United States Court of Military Appeals has slowly expanded court-martial jurisdiction thereby eroding the constitutional principle announced in *O'Callahan v. Parker?*

2. Whether, in light of the changes in the military justice system, the constitutional principle announced in *O'Callahan v. Parker* is still valid?

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BRIEF OF THE APPELLATE DEFENSE DIVISION
UNITED STATES NAVY-MARINE CORPS
APPELLATE REVIEW ACTIVITY
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Petitioner and Respondent have consented to the submission of this amicus curiae brief by the Appellate Defense Division. Copies of the consents have been filed with the Court.

INTEREST OF THE APPELLATE DEFENSE DIVISION

The Appellate Defense Division represents convicted members of the Naval Service before the U.S.

Navy-Marine Corps Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court. This representation is provided for by Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870 (Supp. II 1984).

The Appellate Defense Division is the principal source of representation for all Navy and Marine Corps members convicted by court-martial and sentenced to a punitive discharge or more than one year's confinement. The decision of the court below is an unprecedented and unconstitutional expansion of court-martial jurisdiction. If allowed to stand, that decision will have an adverse impact on Navy and Marine Corps personnel by depriving them of the fundamental rights available in civilian courts.

STATEMENT OF THE CASE

The facts are cogently and completely set out in the petition. Essentially, petitioner was charged with committing various sex offenses with two young girls. Some of the alleged offenses occurred while petitioner was stationed in Juneau, Alaska, while the others allegedly occurred after petitioner was transferred to Governors Island, New York. The court-martial was convened at Governors Island. At trial the defense successfully moved to dismiss the Alaska based charges for lack of subject matter jurisdiction. The Government appealed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (Supp. II 1984). The U.S. Coast Guard Court of Military Review reversed the military judge's ruling. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). Petitioner appealed to the U.S. Court of Military Appeals which affirmed the lower court's decision. *United States v.*

Solorio, 21 M.J. 251 (C.M.A. 1986). Petitioner was subsequently convicted of eight offenses committed in Alaska.

SUMMARY OF ARGUMENT

In *O'Callahan v. Parker* the Court announced the constitutional principle that court-martial jurisdiction must be limited to those cases which are service-connected. In recent years, the U.S. Court of Military Appeals has eroded that principle by basing jurisdiction on the type of offense involved, rather than on a case by case analysis. Because the sacrifice of constitutional rights can only be justified by an overriding interest in maintaining discipline and order, the military should still be required to show that each individual case is service-connected before exercising jurisdiction.

ARGUMENT

I. THE UNITED STATES COURT OF MILITARY APPEALS HAS SLOWLY ERODED THE CONSTITUTIONAL PRINCIPLE ANNOUNCED IN *O'CALLAHAN V. PARKER*.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court first set forth the service-connection test for determining court-martial jurisdiction. The Court balanced the constitutional rights of trial by jury and indictment by grand jury with the military's need for discipline and obedience. Because courts-martial do not provide those constitutional safeguards, their ju-

risdiction can extend only to those offenses which are service-connected. *Id.* at 261.[1]

In *Relford v. Commandant,* 401 U.S. 355 (1971), this Court applied the service-connection test. The *Relford* Court applied several factors to the facts and determined that the offenses were service-connected.[2]

Following the *O'Callahan* and *Relford* decisions, the U.S. Court of Military Appeals began a strict application of the service-connection test. *United States v. Moore,* 1 M.J. 448 (C.M.A. 1976). The court frequently relied upon the factors enunciated in *O'Callahan* and *Relford* in ruling on subject-matter jurisdiction issues. *United States v. Alef,* 3 M.J. 414 (C.M.A. 1977); *United States v. McCarthy,* 2 M.J. 26 (C.M.A. 1976). Applications of those factors resulted in determinations that many offenses were not service-connected.[3]

[1] The *O'Callahan* Court considered the following factors in determining whether O'Callahan's offenses were service-connected: his proper absence from the base, the commission of the offenses off base, the civilian status of the victim, the absence of military control over the location of the offenses and the availability of civilian courts to prosecute. *O'Callahan* at 273.

[2] The *Relford* Court enunciated the following factors: 1) the serviceman's proper absence from the base; 2) the crime's commission away from the base; 3) its commission at a place not under military control; 4) its commission within our territorial limits and not in an occupied zone of a foreign country; 5) its commission in peacetime and its being unrelated to authority stemming from the war power; 6) the absence of any connection between the defendant's military duties and the crime; 7) the victim's not being engaged in the performance of any duty relating to the military; 8) the presence and availability of a civilian court in which the case can be prosecuted; 9) the absence of any flouting of military authority; 10) the absence of any threat to a military post; 11) the absence of any violation of military property; 12) the offense's being among those traditionally prosecuted in civilian courts. *Relford* at 356.

In *United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals departed from its strict adherence to the *O'Callahan-Relford* factors. Instead of applying the principle announced in *O'Callahan* to the specific facts of the case, the court based its ruling on the type of offense involved. Trottier was convicted of three offenses involving the sale of narcotics. Two of the offenses took place off base. *Trottier* at 337. In ruling that all of the offenses were service-connected the court concentrated on the military's drug problems and the need for maintaining a drug free military environment. *Id.* at 345-350. That need is so great, the court concluded, that "very few drug involvements of a service person will not be service-connected." *Id.* at 351. The court identified two drug related offenses which might not be service-connected:

> [I]t would not appear that use of marijuana by a service person on a lengthy period of leave away from the military community

[3] 3. *See United States v. Strangstalien,* 2 M.J. 81 (C.M.A. 1979) and *United States v. Williams,* 2 M.J. 81 (C.M.A. 1976) (off base drug offenses held not service-connected after application of *O'Callahan-Relford* factors); *United States v. Conn,* 6 M.J. 351 (C.M.A. 1979) (off base use of marijuana by an officer, in the presence of enlisted members under his command, not service-connected). *See also United States v. McGonigal,* 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley,* 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson,* 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969) (all holding that off base sex offenses against military dependents were not service-connected).

> would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*. Similarly, the interest of the military in the sale of a small amount of a contraband substance by a military person to a civilian for the latter's personal use seems attenuated.

Trottier at 350 n.28 (citations omitted).

The U.S. Court of Military Appeals subsequently expanded court-martial jurisdiction to include the first of the above situations. In *United States v. Brace,* 11 M.J. 795 (C.M.A. 1981), the court again concentrated on the nature of the offense and held that court-martial jurisdiction existed over an accused's off base use of marijuana 275 miles from his duty station. Finally, in *Murray v. Haldeman,* 16 M.J. 74 (C.M.A. 1983), the court held that if a servicemember returns to a military installation subject to any physiological or psychological effects of a controlled substance, then the use of that drug, regardless of the duration of the absence or the location of the use, is service-connected. Thus, the lower court has essentially made any drug offense punishable by court-martial, in total disregard of the *O'Callahan-Relford* mandate to determine military jurisdiction based on the specific facts of each case.

In *United States v. Lockwood,* 15 M.J. 1 (C.M.A. 1983), the court once again departed from a strict application of the *O'Callahan-Relford* test. Rather, the *Lockwood* court created its own factors in determining

that an off base forgery and larceny were service-connected.[4]

In *United States v. Scott,* 21 M.J. 345 (C.M.A. 1986), the court included the accused's status as an officer as a factor in determining that an off base offense was service-connected. While Chief Judge Everett, writing for the court, stopped short of holding that *all* officer misconduct is service-connected, Judge Cox in his concurring opinion stated that officer misconduct is always service-connected. *Id.* at 347 and 350. Just as *Trottier* created a nearly *per se* rule regarding drug offenses, the *Scott* decision creates nearly automatic subject matter jurisdiction if the accused is an officer.

Finally, in *United States v. Solorio,* 21 M.J. 251 (C.M.A. 1986), the court has created automatic subject matter jurisdiction for a third category of cases: sex offenses against dependent children. *Solorio* at 256. This continuing trend of the lower court to make the service-connection test applicable to "types" of offenses rather than applying the *O'Callahan-Relford* analysis must stop. By categorizing military cases and creating *per se* rules of subject matter jurisdiction the lower court has slowly circumvented the *O'Callahan* Court's constitutional principle that military jurisdiction should be limited to only those offenses that are service-connected. Furthermore, the *Lockwood* court's reliance on damage to the military's reputation has

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[4] The *Lockwood* court considered such factors as: the adverse impact off base crimes have on morale, readiness and the military's reputation in the civilian community, the use of a Government identification card during the offenses and the military's policy of trying all known offenses at a single trial. *Lockwood* at 9-10.

the potential to make any offense service-connected. Theoretically, any offense committed by a service-member off base lowers the military's esteem. The lesson of *O'Callahan* and *Relford* is that the determination of what cases may or may not be service-connected must be made on a case by case analysis. By holding that drug offenses, sex offenses against dependent children, offenses committed by officers and offenses that lower the military's esteem are automatically service-connected, the lower court has actually expanded court-martial jurisdiction, thereby eroding the constitutional principle that military jurisdiction must be limited to that which is absolutely necessary to maintain discipline and order.

II. THE CONSTITUTIONAL PRINCIPLE ANNOUNCED IN *O'CALLAHAN V. PARKER* IS STILL VALID.

The fifth amendment of the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. In addition, the sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." U.S. Const. amend. VI. The Constitution gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Pursuant to that authority, Congress has enacted the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1982), which establishes a system of courts-martial. This system, however, does not provide the constitutional protections available in civilian courts. *O'Callahan v. Parker,* 395 U.S. 258, 262 (1969).

O'Callahan was an Army corporal convicted by court-martial of various sex offenses committed off base in a leave status. The victim was a civilian with no military connections. O'Callahan filed a petition for a writ of habeas corpus arguing that the court-martial lacked jurisdiction to try him. In holding that the military was without jurisdiction, the *O'Callahan* Court balanced the constitutional rights protected by civilian courts with the exclusion of military cases from the fifth amendment and Congress' authority under article I, section 8.[5] The Court concluded that in order for the military to have jurisdiction the accused must not only be a service-member but the offense must also be service-connected. *O'Callahan* at 272.

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[5] Significantly, the framers did not exclude "persons in the land and naval forces" from the fifth amendment's protections but "cases."

In reaching its holding the Court restated what it said in *Toth v. Quarles*, 350 U.S. 11 (1955), that:

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. *Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.* But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that *military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.*

Id. at 262 (emphasis added) (quoting *Toth v. Quarles*, 350 U.S. 11, 17 (1955)). The Court further recognized the limitations of military courts in that:

> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote.

The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

> A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

Id. at 263-65 (footnote omitted).[6] Because of those limitations and the absence of important constitutional protections, the *O'Callahan* Court held that the jurisdiction of courts-martial must be limited to that necessary to fulfill the military's purpose—the maintenance of military readiness and discipline. *Id.* at 272.

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[6] The provision authorizing a conviction by a two-thirds vote has recently been upheld. *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983), *aff'd*, 20 M.J. 330 (C.M.A. 1985).

A. THE MILITARY JUSTICE SYSTEM STILL DOES NOT PROVIDE SUFFICIENT SAFEGUARDS TO WARRANT AN EXPANSION OF COURT-MARTIAL JURISDICTION.

The *O'Callahan* Court enumerated many deficiencies in the military justice system:

> For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries.

O'Callahan at 263. The Court also recognized that there is in the military system:

> [T]he suggestion of possible influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members. . . .

Id. at 264. Although many changes have occurred in the military justice system in the 17 years since *O'Callahan,* most of the conditions set forth above remain the same.

In 1980, the Military Rules of Evidence were promulgated. The military rules were taken in large part from the Federal Rules of Evidence with only minor changes.[7] In addition, improvements have been made

[7] The Military Rules of Evidence were adopted by the President on 1 September 1980. The drafter's analysis of many of the rules indicates that they were taken without change or *mutatis mutandis,* from the Federal Rules of Evidence. In addition, the Military Rules of Evidence include subjects not within the compass of the Federal Rules. *See generally* Saltzburg, Schinasi & Schleuter, *Military Rules of Evidence Manual,* Foreward (1981).

in the quality of representation an accused receives. The accused is entitled to an appointed licensed attorney and may also retain a civilian attorney to represent him. Uniform Code of Military Justice, art. 38, 10 U.S.C. § 838 (1982). In the U.S. Marine Corps, however, the appointed counsel as well as the prosecutor are assigned to the staff of the convening authority. In the U.S. Navy, the defense counsel and the prosecutor do not work for the convening authority but both do work for the same person, a senior officer in the Judge Advocate General's Corps.[8] Thus, the prosecutor and the defense counsel in the U.S. Navy ultimately have their evaluations written by the same person.

Military judges still do not serve under the protection of life tenure. They are appointed by and serve at the discretion of the Judge Advocates General. Their salaries are controlled by Congress just as are the salaries of all military personnel.

The accused's commanding officer, the convening authority, is responsible for referring the charges to court. R.C.M. 306 and 404. He also selects officers (or at the accused's request senior enlisted personnel) from his own command to sit in judgment of the

[8] Because in the U.S. Navy trial counsel and defense counsel work for the same command, attorneys can change roles every several months. That creates the potential for a conflict of interest. *See United States v. McArthur,* Misc. Dkt. No 85-11 (N.M.C.M.R. 29 Nov. 1985), Appendix A.

accused. R.C.M. 503. Therefore, the individuals who compose the panel have their evaluations prepared by the same person who originally decided that the accused should be court-martialed.[9]

Changes in the military justice system have resulted in improvements in the quality of military justice. However, many of the basic deficiencies recognized in *O'Callahan* have not been improved. Furthermore, regardless of the quantity or quality of improvements, the court-martial system will always be fundamentally and systemically different from the civilian criminal justice system. For those reasons, the exercise of court-martial jurisdiction should still be reserved for those cases having service-connection.

B. THE SACRIFICE OF OTHER CONSTITUTIONAL AND STATUTORY RIGHTS BY SERVICE-MEMBERS HAS ALWAYS BEEN JUSTIFIED BY THE MILITARY'S NEED FOR DISCIPLINE AND ORDER.

Military servicemembers "may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace,* 462 U.S. 304 (1983) (quoting Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. Rev. 181, 188 (1962)). Only when the military's need for discipline and order outweighs the interest protected, must a servicemember surrender the right.

In *Parker v. Levy,* 417 U.S. 733 (1974), the Court balanced the due process rights of the fifth amendment and the first amendment's protections of free expression with the military's special needs to main-

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[9] *But see* Uniform Code of Military Justice, art. 37, 10 U.S.C. § 837 (1982) (a commanding officer is prohibited from basing a member's evaluation on his court-martial performance).

tain discipline and order. Levy, an Army captain, challenged his conviction for violating Articles 133 and 134, Uniform Code of Military Justice,[10] on the grounds that they were unconstitutionally vague and that they prohibited protected speech. In denying petitioner's claim, the Court stated that the standard for determining constitutional vagueness is less stringent when a military criminal statute is involved. *Parker v. Levy* at 756. The Court based its holding on the recognition that, as opposed to the goals of a civilian community, it is the primary purpose of the military to prepare for and fight wars. *Id.* at 743. Because of this special purpose, the military must have the tools necessary to enforce discipline and duty. Consequently, the individual rights of due process must fall in light of those overriding concerns. *Id.* at 744. The Court concluded that Congress may "legislate with greater breadth and with greater flexibility when prescribing rules which govern the military." *Id.* at 756.

In denying Levy's first amendment challenge, the Court again balanced a basic constitutional right against the military's special needs and interests. The Court justified the military's suppression of Levy's constitutional right with the military's "fundamental necessity for the imposition of discipline. . . ." *Id.* at 758. Because the military must be able to command obedience, servicemembers may not speak as freely as civilians.

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[10] 10 U.S.C. § 933 and 934 (1982). Article 133 prohibits "conduct unbecoming an officer and a gentleman" while Article 134 prohibits all conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Similarly in *Chappell v. Wallace,* 462 U.S. 296 (1983), the Court held that military members may not sue their commanding officers for violations of constitutional rights. In denying servicemembers this right, the Court again concentrated on the military's mission and the need for strict obedience and discipline to accomplish that mission. The Court concluded that the "unique disciplinary structure" of the military justified denying servicemembers legal recourse for the deprivation of constitutional rights.

Most recently, in *Goldman v. Weinberger,* ___ U.S. ___, 106 S.Ct. 1310 (1986), the Court upheld a U.S. Air Force regulation prohibiting the wearing of any headgear while indoors. Goldman challenged the regulation, arguing that it prohibited religiously motivated conduct protected by the first amendment. The Court held that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman,* 106 S.Ct. at 1313. Therefore, because the regulation was necessary to the needs of the military for discipline and order, the first amendment right had to be sacrificed.

These precedents are consistent with *O'Callahan.* They all require the armed services to point to a legitimate military interest that must be protected in order to justify depriving a servicemember of a basic constitutional right. Absent that interest, there is no justification. The legitimate military interest common to these precedents is the need to maintain obedience, order and discipline.

Therefore, before a servicemember can be deprived of those rights he loses in trial by court-martial, the military must demonstrate that trial by court-martial is necessary to protect obedience, order and discipline,

i.e., that the offense is truly service-connected. Furthermore, *O'Callahan* and *Relford* make clear that this demonstration of service-connection must be based on an analysis of the facts of a specific case. The *O'Callahan* Court found that placing those limitations on the exercise of military jurisdiction was fully consistent with the fifth amendment's exclusion of "cases arising in the land or naval forces. . . ." Thus, the *O'Callahan* Court's holding that cases must be "service-connected" is consistent with the fifth amendment's language.

CONCLUSION

The lower court has slowly eroded the constitutional principle announced in *O'Callahan.* Military jurisdiction is now based on the type of offense involved rather than an analysis of the specific facts of each individual case. The military, however, still does not provide the basic procedural safeguards and constitutional rights provided by civilian courts. This Court should reaffirm the constitutional principle that the military cannot force servicemembers to sacrifice their basic constitutional rights unless the military can demonstrate that the offense is service-connected.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW

Misc. Dkt. No. 85-11

UNITED STATES,

Appellant,

v.

JAMIE L. MCARTHUR
464 82 9661 Radioman Third Class (E-4) U.S. Navy,
Appellee.

GENERAL COURT-MARTIAL

OPINION OF THE UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW ON THE APPEAL BY THE UNITED STATES

Decided 29 November 1985

LTCOL STEPHEN MITCHELL, USMCR, Appellate Government Counsel
LT STEVEN P. BENSON, JAGC, USNR, Appellate Government Counsel
MAJ MICHAEL E. CANODE, USMC, Appellate Defense Counsel
LT GARY K. VAN METER, JAGC, USNR, Appellate Defense Counsel

PER CURIAM:

This case is now before us on appeal by the Government. A brief recitation of the proceedings to date will suffice at this stage to provide a frame of reference; additional

information will be added at the proper points in our analysis. In the course of preparing this case for trial Lieutenant S, the trial defense counsel, consulted his immediate superior, the Senior Defense Counsel (Lieutenant Commander M) regarding several particular aspects of defense strategy and problems, receiving specific advice in response. Later, Lieutenant Commander M's duties were changed to Senior Trial Counsel at the same Naval Legal Service Office. Lieutenant S, when he discussed this case with Lieutenant Commander M, was not aware that this reassignment would occur, and the record does not reveal whether Lieutenant Commander M had such knowledge. Lieutenant Commander M then performed the duties of trial counsel in this case from its earliest stages, accumulating evidence, advising the convening authority on the charges, serving the accused, representing the Government at the Article 32 (UCMJ) pretrial investigation, and acting as prosecutor during initial stages of the trial. Prior to pleading the appellant moved to dismiss the Charge or, in the alternative, to remove Lieutenant Commander M from trial counsel duties due to disqualification resulting from his earlier connection with the case. The military judge denied the motion to dismiss but granted the motion to disquality Lieutenant Commander M as trial counsel. Lieutenant M then assumed duties as trial counsel. Subsequently, however, after further presentation of evidence and argument, the military judge announced that he was reconsidering the earlier motion to dismiss and granted the motion. The trial counsel then obtained a continuance and filed the instant appeal. We have determined that this case is within our jurisdiction as its resolution involves a question of law. Article 62(b), UCMJ.

We see two issues for resolution: (1) Was Lieutenant Commander M disqualified from acting as trial counsel and (2) is dismissal warranted? In regard to grounds for disqualification of counsel, Article 27(a)(2) points out. "... nor may any person who has acted for the defense act

later in the same case for the prosecution." The meaning of the phrase "person who has acted for the defense" is vital. Restricting application of the phrase to the conventional attorney-client relationship appears unwarranted, as the drafters could easily have so specified if that was their intent; the use of a more expansive phrase instead convinces us that the drafters intended to allow for a broad range of eventualities. This less-restrictive interpretation is echoed in the Discussion of R.C.M. 901(d), which explains that disqualification of an attorney may result merely from "duties or actions which are inconsistent with the role of counsel."

The Government has protested that liberality in construction of the phrase "acted for the defense" will torpedo the Naval Legal Service Office fleet. We are not inclined to accept the Government's alarmist assertions that the fate of the Naval Legal Service Office concept is at stake in this case. Such establishments have been in operation for a lengthy period with few problems of the present nature called to our attention, probably because an appreciation of the potential for conflict and the application of common sense have resulted in sound plans to avoid the type of conflict we see here. But, this very potential for conflict still cannot be ignored and instead neccessitates scrupulous attention:

> In the delicately balanced system of military justice, where potential for such situations is always present due to regular office assignment rotation, counsel sensitivity to this issue is particularly important. It is not enough, however, for the military lawyer to avoid any actual conflicts of interests, but also to avoid even the slightest appearance of impropriety.

United States v. Hannon, 19 M.J. 726, 728 (NMCMR 1984).

It is precisely this "appearance of impropriety" which is so vividly evident in the case at hand. Although the

appellant and appellee differ over many aspects of the case, they do agree that substantial matters bearing on the defense of appellee were discussed between Lieutenant Commander M, as senior defense counsel, and Lieutenant S. These included the appellee's denial of the allegations against her, the existence of blood in her room and a bloody towel, steps to obtain full discovery of Naval Investigative Service reports, methods to force a speedy trial, and drug-induced hypnosis to elicit information possibly repressed in the appellee's memory. They further agree that no privileged communications were revealed to Lieutenant Commander M and that he did not act in bad faith or out of improper motive in assuming as trial counsel after conferring while Senior Defense Counsel with the detailed defense counsel. Based on these facts we find that Lieutenant S committed no impropriety in discussing defense-related matters with Lieutenant Commander M, a fellow defense counsel, that Lieutenant S could reasonably believe that the information about appellee's case shared with Lieutenant Commander M would not be used adversely to appellee, and that Lieutenant Commander M, through these discussions, gained this information solely by reason of his status as senior defense counsel. Once in possession of this information Lieutenant Commander M could not reasonably be expected to expunge it from his memory, so he was under an obligation not to place himself in a position of apparent conflict. Although we have found no attorney-client relationship between Lieutenant Commander M and the appellee in the normal sense, no communication of privileged information from Lieutenant S to Lieutenant Commander M, and no apparent bad faith on the part of Lieutenant Commander M, we still have a set of circumstances which graphically raises the potential for conflict of interest, where an attorney comes into possession of substantial information about the defense case by virtue of his official position and consultation with the defense counsel, but then switches sides to prosecute the

case from its outset. Moreover, we cannot ignore the exhortations of *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), to resolve doubts in favor of the accused and of *United States v. Stringer*, 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954), to disquality the trial counsel where the possibility of prejudice exists, without resorting to refined calculations as to the precise quantity of prejudice or its probable effect on the results of trial. *See also* Discussion to R.C.M. 901(d), *Manual for Courts-Martial, 1984*. For these reasons we find that Lieutenant Commander M "acted for the defense" and was therefore disqualified from service as trial counsel.

Next we examine the military judge's decision to dismiss the charge. In their briefs the appellant and the appellee have argued the doctrines of general versus specific prejudice. We see no need to enter this murky area of the law. *See United States v. Jerasi*, 20 M.J. 719 (NMCMR 1985) (*en banc*); *compare United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955) *with United States v. Brooks*, 2 M.J. 102 (C.M.A. 1977). Instead, we are convinced that, as a matter of law, the military judge abused his discretion by imposing the draconian remedy of dismissal, when a less drastic means of relief was available. The issue before the military judge was not of the type that demanded dismissal as exclusive relief, *see* R.C.M. 907(b)(1), and the circumstances, even though serious, were not of the egregious sort which cry out for terminal disposition. Rather than dismissal, the proper remedy would balance the equities by allowing the government to continue with the proceedings but protect the appellee from any improper influence of Lieutenant Commander M's participation, and the exact nature of such protection would be determined by Lieutenant Commander M's involvement. Moving from general to specific, it logically follows from Lieutenant Commander M's disqualification at the trial itself that he is disqualified from participation at earlier stages of the case as well. This derives from the language

of Article 27(a)(2) which warns that someone who acts for the defense may not "act later *in the same case*," (not just at trial), thus imposing a flexible standard dependent on the exact circumstances. Based on the extensive involvement by Lieutenant Commander M from the earliest stages of this case we cannot discount the possibility that the information gleaned from his consultations with the trial defense counsel influenced his actions, even if subconsciously and unintentionally. Furthermore, the same appearance of impropriety results from Lieutenant Commander M's involvement at whatever stage.

We therefore reverse the decision of the military judge dismissing the charge and order that this case be returned to the convening authority, who may either (1) dismiss the Charge, or (2) forward the Charge to another convening authority who shall determine if further action on the Charge is appropriate. If alternative (2) is followed, the following constraints shall apply: (a) The transferee convening authority shall be neutral and have no prior knowledge of the case; (b) The transferee convening authority shall make an independent determination, completely free of influence from prior proceedngs and any new proceedings must commence with a new preferral of charges; (c) The transferee convening authority may, in arriving at his disposition, consider only matters of factual/evidentiary nature and not the opinions/conclusions/work product of any prior trial counsel in the case; (d) Any new trial counsel shall have no access to this record, other earlier proceedings in the case, or work product of the prior trial counsels and the prior trial counsels in the case shall have absolutely no further involvement with it; (e) Our intent is that this case be treated as a new case, developed from its earliest stages without any taint whatsoever from the prior proceedings—all further proceedings must be governed by this intent and doubts shall be resolved by referring to this intent. We are aware from comments in the record that the statute of limitations may constrain further pro-

ceedings, presenting us with the option of dismissing the charges as a matter of judicial economy. As this matter was not fully expounded in the record we consider the convening authority in the best position to weigh the available alternatives and choose the fairest disposition.

/s/ John W. Kercheval II
John W. Kercheval II, Senior Judge

/s/Michael D. Rapp, Judge
Michael D. Rapp, Judge

See Concurring/Dissenting Opinion)
John E. Grant, Jr., Judge

GRANT, Judge (concurring/dissenting):

I disagree with the majority that the relevant issues in this case can be resolved without squarely addressing the matter of specific versus general prejudice, and I will address such matters below after expanding on the summarization of evidence set forth in the majority opinion.

SUMMARY OF EVIDENCE

The original trial counsel, Lieutenant Commander M, in his previous capacity as Senior Defense Counsel, was consulted by Lieutenant S, the appellee's former defense counsel, in regard to the proper defense strategy to be employed in the defense of the appellee. Lieutenant Commander M did not enter into an attorney-client relationship with the appellee, but did discuss with Lieutenant S, before preferral of charges, the Article 32 Investigation, and referral of charges to trial, matters which included the appellee's denial of wrongdoing and the advisability of subjecting the appellee to hypnosis. It was conceded by the appellee that no confidential communications related to Lieutenant S by the appellee were disclosed to Lieutenant Commander M, who subsequently was transferred to prosecution and specifically assigned as trial counsel at appellee's Article 32 investigation and court-martial. The trial judge initially denied appellee's motion to dismiss charges because of Lieutenant Commander M's prior participation as a defense consultant, but did disqualify Lieutenant Commander M from acting in a prosecutorial role, believing that any prejudice to appellee as the result of Lieutenant Commander M's prior relationship with Lieutenant S could be headed off by removing the source of prejudice.

Lieutenant M, was duly assigned to replace Lieutenant Commander M as trial counsel, and the matter might have ended there except that Lieutenant Commander M continued to operate in the background in support of the

prosecution of appellee. Lieutenant M admittedly utilized Lieutenant Commander M in an administrative capacity in preparing for trial, although Lieutenant M denied consulting with Lieutenant Commander M on strategy or in regard to any previous discussion between Lieutenant Commander M and Lieutenant S. To further complicate matters, Lieutenant M was alleged to have engaged in an *ex parte* conversation with the trial judge following the relief of Lieutenant Commander M and after having sought Lieutenant Commander M's counsel, in regard to matters involving the statute of limitations and the effect thereof should the trial judge require preferral of new charges pursuant to a defense motion; Lieutenant Commander M delivered a document to trial defense counsel, after his relief, denying the defense a material witness and allegedly misrepresented that the requested defense witness would no longer support the defense's position, which document Lieutenant Commander M prepared apparently before he was relieved as trial counsel; and finally, Lieutenant Commander M, after his relief, approached the defense counsel and requested that he agree to dispose a prospective witness.

Given these new revelations, the trial judge reconsidered and granted appellee's motion to dismiss. In dismissing the charges, however, the trial judge did not address the effect of Lieutenant Commander M's continued participation in the trial of appellee subsequent to his relief from duties as trial counsel, apparently because the trial judge was content to premise his decision on general rather than specific prejudice, citing *United States v. Green,* 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), and the third prong of Judge Fletcher's concurring opinion, in *United States v. Brooks,* 2 M.J. 102 (C.M.A. 1977). The trial judge simply found that trial strategy was discussed in Lieutenant Commander M's conversation with Lieutenant S, when the former was a Senior Defense Counsel and the latter represented the appellee, and as it was impossible to de-

termine what subconscious use may have been made of such conversations by the prosecution in the pretrial stages of the court-martial, any doubt must be resolved in favor of the appellee by dismissing the charges.

I

I do not share with the trial judge his interpretation of the *Green* case, nor do I believe that the facts in the case *sub judice* rise to the level of Judge Fletcher's third prong application of general prejudice in *Brooks*. *Green* involved a flagrant breach of the attorney-client relationship where the duly assigned defense counsel provided the staff judge advocate confidential information detrimental to his client's interest. In the case *sub judice,* Lieutenant S admittedly did not disclose any confidential communications of the appellee, but rather discussed trial strategy with the Senior Defense Counsel, and therefore, the extreme remedy of dismissal based on general prejudice is not mandated by *Green*. Secondly, *Brooks* generally stands for the proposition that where privileged communications are made to third persons outside the attorney-client relationship (The trial defense counsel made disclosures of a confidential nature to the military justice officer, who traditionally is a government representative), the test to be applied for dismissal is specific, not general, prejudice, and where an accused is convicted, under such circumstances, the conviction can be affirmed if the record demonstrates that the use made of the communication was harmless to the accused and that the conviction was otherwise valid. Judge Fletcher, in concurring in the result, would apply the doctrine of general prejudice only in three situations, namely, (1) where the defense counsel abandons his client; (2) where the government initiates the breach in a manner outside permissible legal confines; and (3) where the actions of the attorney so impregnate the proceedings as to make an appellate determination of extent of prejudiced impossible. In each of the three situations, according to Judge Fletcher,

"the very integrity of our judicial system and the concept of a fair trial are so violated as require this Court to dispose with a search for prejudice." In the case *sub judice,* the trial judge makes no specific factual determinations to support his conclusion that the actions of Lieutenant Commander M were so pervasive in nature as to inherently taint the entire proceedings and constitute prejudicial error *per se*. On the contrary, the trial judge failed to assess such actions and particularly declined to address the effects of Lieutenant Commander M's post-relief activities in this regard.

I cannot agree, as a matter of law, with the trial judge that it is impossible to assess the effects of Lieutenant Commander M's participation in pretrial proceedings for specific prejudice. The case file turned over to Lieutenant M by Lieutenant Commander M could have been reviewed and assessed for taint, and both Lieutenant Commander M and Lieutenant M were available to testify. Lieutenant Commander M's subsequent activities after being relieved as trial counsel also may be assessed for specific prejudice, as well as his prejudicial influence, if any, in the preferral of charges, the Article 32 investigation, and the referral of charges to trial, upon the proper presentment of evidence. The trial judge failed to address the issue of specific prejudice, although the competent evidence of record indicates that either on the motion or during the course of the trial, there was or would have been ample opportunity to assess the impact of Lieutenant Commander M's activities on the appellee's right to confidentiality in an attorney-client relationship and to determine whether any error in this regard prejudiced the rights of the appellee to a fair trial. The trial judge's reliance upon the unproven, subconscious thought processes of members of the trial team effectively emasculates the majority opinion in *United States v. Brooks, supra,* and goes far beyond Judge Fletcher's third prong invoking general prejudice, where, respectively, the trial judge did not pursue the search for

specific prejudice in Lieutenant Commander M's conduct and the record of trial does not contain such evidence to sustain a finding, as a matter of law, that Lieutenant Commander M's conduct so impregnated the proceedings as to make impossible appellate review on the extent of the prejudice. The teachings of *Brooks* would effectively be reduced to an assessment of specific prejudice by supposition, unfounded in fact, in sanctioning the trial judge's rationale.

Accordingly, I join with the majority in reversing the trial judge's dismissal of the charges, where the trial judge failed to address the issue of specific prejudice. Although I concur with the majority that Lieutenant Commander M was properly relieved by the trial judge from further participation as trial counsel for the reasons indicated in the majority opinion, I decline to adopt the further position of the majority: (1) requiring the convening authority to either dismiss the charges or defer to a new convening authority for action; (2) mandating the preferral of new charges should the new convening authority elect to proceed; and (3) imposing restrictions on the turnover of case records to the new trial counsel which go beyond obviating any taint occasioned by Lieutenant Commander M's past association with Lieutenant S and make any subsequent prosecution of the appellee extremely difficult. I would return the record of trial for further proceedings, where the matter of specific prejudice may be fully assessed and evidence of specific prejudice, if any, introduced on all matters relating thereto, including but not necessarily limited to the circumstances under which the original charges were preferred and referred to trial.

/s/ John E. Grant, Jr.
John E. Grant, Jr.